83 - 1828

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NICHOLAS SPERLING,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Did the government's failure to disclose a recorded conversation between the government's chief witness and the Chief Assistant United States Attorney violate the Jencks Act and deprive petitioner of a fair trial and due process of law?

2. Should a new trial be ordered pursuant to the federal judiciary's supervisory authority over federal law enforcement?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Nicholas Sperling, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 20, 1984.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 726 F.2d 69 (2d Cir. 1984) and appears as Appendix A to this petition. The Court of Appeals affirmed a judgment of conviction rendered on May 5, 1983, in the United States District Court for the Southern District of New York (Knapp, J.), upon a jury verdict convicting petitioner of conspiracy to distribute heroin and one count of distribution and possession with intent to distribute heroin in violation of 21 U.S.C. §§812, 814(a)(1), 841(b)(1)(A), and 846. The Court of Appeals also affirmed the trial judge's order which denied, without a hearing, petitioner's Rule 33 motion for a new trial based

upon newly discovered evidence. Petitioner was sentenced to a three year term of imprisonment followed by a ten year term of special parole and, with respect to the conspiracy count, a term of probation.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within 60 days of the Court of Appeals' denial of petitioner's motion for rehearing and rehearing *en banc* dated March 8, 1984, which appears as Appendix B to this petition.

Constitutional Provisions Involved

United States Constitution, amendment 5. This appears as Appendix C to this petition.

Statutory Provisions Involved

Rule 33 of the Federal Rules of Criminal Procedure, 18 U.S.C. §3500, Rule 10(e) of the Federal Rules of Appellate Procedure, Rule 52(a) of the Federal Rules of Criminal Procedure. These provisions appear as Appendix D to this petition.

Statement of the Case

The Trial

Petitioner, Nicholas Sperling, was convicted in the United States District Court for the Southern District of New York following a jury trial before Judge Knapp of the crimes of conspiracy to distribute, distribution, and possession with intent to distribute heroin.

The primary witness for the government at trial was Leroy "Nicky" Barnes, a convicted multi-millionaire narcotics dealer serving a life sentence for conducting a con-

tinuing criminal enterprise imposed following a trial in the Southern District of New York.

In March 1982, Barnes entered into a written cooperation agreement with the government. Under the terms of the agreement, Barnes was to provide the Drug Enforcement Administration (DEA) with information about drug dealers and testify before various grand juries and trials, as needed. In exchange for this cooperation, the government agreed to make Barnes' cooperation known to the Pardon Bureau in Washington, D.C. and/or anyone else to whom Barnes wished to have this information made known.

In January, 1983, Barnes and the government entered into a second written cooperation agreement under the terms of which Barnes was to plead guilty to a violation of the anti-racketeering (RICO) statute. Pursuant to that agreement, Barnes pleaded guilty to charges involving multiple murders committed to protect his previously described heroin distribution business.

Barnes testified that in January, 1982, he had been transferred to the Metropolitan Correctional Center (MCC) in New York City, where he came in contact with petitioner's father, Herbert Sperling, who was also serving a life sentence for drug trafficking. Barnes and Sperling allegedly orchestrated a drug transaction in which Sperling's son —the petitioner herein—would provide the heroin, and Barnes, through his former girl friend Beverly Ash ("Ash"), would arrange to find a buyer.* Barnes contacted the DEA about the planned deal, and DEA Agent Robert Baker was positioned as the proposed buyer.

On re-direct examination Barnes was asked to explain his reasons for cooperating with the U.S. Attorney's Office. Barnes stated that while in the Federal Penitentiary in

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* Petitioner and Ash were to meet at a delicatessen in midtown Manhattan. Since they had never met before, each was to carry a copy of Life magazine for recognition purposes.

Terre Haute, he learned his attorneys in Detroit, Michigan, had swindled him out of a lot of money and his two lady friends had "run off" with members of the "Council," his drug distribution ring. Faced with these facts, he "took stock" of himself: "Well, what kind of guy could you (Barnes) be if your friends treat you like this?" Having concluded his status was defined by, and his romantic attachments existed commensurate with, his role as a major drug dealer and the profits generated by that activity, and taking into consideration letters he received while in jail from young people admiring his wealth and drug-related power—"I just realized that the damage we (the Council) was (sic) doing to the community and to our people just didn't balance with the benefits that were coming into us." In sum, Barnes claimed his decision to cooperate was the product of a re-evaluation of his life and the relationships he had entered into. Barnes had "found himself," realized the error of his ways, and was now dedicating himself to the good of society.

The government also offered the following circumstantial evidence: On February 11, 1982, petitioner and Ash were observed together at a midtown delicatessen carrying copies of Life magazine. Petitioner was seen giving Ash a piece of white paper which was alleged to be a price list for heroin. Nothing else passed between them. Ash was subsequently introduced to DEA Agent Baker and made arrangements to sell him heroin. The final details of the sale were worked out on April 15, 1982, when Ash told Baker that her source, "a young guy named 'Nick or "Nicky'" could supply her with the heroin requested. Despite these arrangements, the sale was never consummated.*

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* Baker had received a sample of heroin from Ash prior to April 15. Barnes testified that Herbert Sperling told him the sample had been passed from petitioner to Ash. Nobody witnessed this purported transaction. Ash did not testify, as she had been killed prior to trial.

Petitioner testified in his own behalf that he met with Ash at a midtown delicatessen on February 11, 1982, and April 15, 1982, but denied that these meetings were narcotics related. Petitioner stated that he and Ash met to discuss the possibility of having Professor Alan Dershowitz, Herbert Sperling's attorney, represent Barnes.

The jury found Sperling guilty under both counts in the indictment.

The Motion for a New Trial

Subsequent to the verdict, but prior to sentence, the United States Attorney's Office supplied counsel for petitioner with a copy of a tape and transcript of a conversation with Barnes which had never been revealed. Thus, in a case which the District Court characterized as being dependent on the credibility of the government witness Barnes, the government had not produced, during the trial, a tape recorded conversation between Barnes and then Chief Assistant United States Attorney William Tendy. That conversation, which had taken place on July 2, 1981, was the first contact the government had with the notorious Mr. Barnes concerning his desire to cooperate in the prosecution of others. In response to the prosecutor's inquiry as to why Barnes wanted to get in touch with him, Barnes replied:

> Mr. N.: Well . . . er . . . [sighs] you mean specifically, right?
>
> WT: Well, no, just generally—the reason why you want to get in touch with me.
>
> Mr. N.: Well, in general, there, there, there are a, a few friends of mine, former friends of mine, that . . . er . . . that were just . . . .
>
> WT: I can't hear you very well.

Mr. N.: Er . . . there were a couple of friends of mine that were supposed to be doing things for me, you know . . . .

WT: Yeah?

Mr. N.: And er, and er, well, they're doing things against me really. . . .

WT: Um hum.

Mr. N.: And, and, and I have no way to reach out to get to 'em and I want to get back at 'em, really.

WT: Um hum.

Mr. N.: That's my primary reason.

Thus, according to Barnes, his primary reason for cooperating with the government was to get revenge against his former associates who, in his view, had in some way betrayed his, Barnes', trust. This conversation, which was recorded in the presence of the then Chief of Narcotics Unit, has concededly always been in the possession of the Narcotics Unit of the United States Attorney for the Southern District of New York. Moreover, since the time of this defendant's arrest, that recording was in the custody of the specific assistant who prepared the 3500 material for production to the defense and who questioned Barnes on behalf of the government at trial.

Although the government was obligated to turn over this tape to the defendant during the course of the trial and the defense had specifically requested any tapes of Barnes, the government did not make it available. Instead, the same government prosecutor who had possession of the tape recorded conversation and, indeed, prepared the information which the government did produce to the defense, elicited from Barnes on re-direct examination the reasons for his decision to cooperate with the government. Thus prompted, Barnes delivered a "sermonette" in which he attributed his decision to a personal re-evaluation of

the shallowness of his life and recently awakened social conscience which resulted from his realization of the damage he had inflicted on the youth of Harlem by flooding that community with narcotics.

Conveniently, the recording of the Barnes-Tendy conversation was not disclosed to defense counsel until April 7, 1983, after a verdict had been rendered. Petitioner unsuccessfully moved before Judge Knapp for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. The denial was affirmed by the Second Circuit on the basis that it believed the conversation was merely cumulative of the evidence previously adduced at trial and its disclosure to the jury would not have affected the verdict.

POINT I

The Government's Failure to Disclose a Prior Statement of Its Key Witness Which Elucidated His Motive in Testifying Deprived Petitioner of a Fair Trial.

1. *The Deliberate Use of False Testimony on the Part of the Government Warrants a New Trial.*

In *Napue* v. *Illinois*, 360 U.S. 264 (1959), this Court reversed a conviction because the prosecution knew that the testimony of its primary witness was false, yet did nothing to correct it. The Court stated that the knowing use of false evidence taints a conviction, is contrary to any concept of ordered liberty, and is, therefore, violative of the Due Process Clause. *Id.* at 269. The rule that such a conviction is tainted applies whether the prosecution solicits the false evidence or merely allows it to go uncorrected, and whether the false testimony goes to guilt or innocence or merely to the credibility of a witness. In stressing the Due Process requirement of a fair trial, the Court held:

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon de-

> fendant's guilt. A lie is a lie, no matter what its subject and if it is *in any way* relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Id. at 269-70 (emphasis added) (quoting *People* v. *Savvides*, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887 (1956). The viability of *Napue* has been affirmed by this Court in subsequent cases. *See, e.g., United States* v. *Agurs*, 427 U.S. 97 (1976); *Giglio* v. *United States*, 405 U.S. 150 (1972).

An application of *Napue* to the case at bar makes clear that petitioner was deprived of a fair trial. After a cross-examination designed to attack the credibility of the chief government witness, Nicky Barnes, the prosecution sought to "resurrect" the witness on redirect examination. In order to divert the jury's focus away from Barnes' abhorrent and illegal past, the prosecution asked him what motivated his decision to cooperate with the government. With this prompting, Barnes waxed eloquent about "finding himself" and the new meaning in his life. With full knowledge that Barnes had contacted the government in 1981 because of a burning desire to extract revenge from accomplices who had double-crossed him, the prosecution not only allowed this sermonette, but encouraged it. In so doing, the government deliberately misled the jury.

Nothing could more easily obstruct a jury's ability to assess the credibility of a witness than false evidence as to his motive for testifying. The fact that the jury had been apprised of other grounds upon which the witness' credibility could be attacked does not diminish the due process violation. *Napue* v. *Illinois*, 360 U.S. 264, 270 (1959). "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be

set aside if there is any reasonable likelihood that [it] could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 104 (1976). Accordingly, the conviction should be reversed and petitioner should be granted a new trial.*

2. *A New Trial Is Required Because the Government Failed to Disclose Significant Jencks Act Material.*

Although defense counsel specifically requested all of Nicky Barnes' Jencks Act statements and the government represented that all such items had been turned over to the defense, weeks after the verdict in this case the government produced, for the first time, the July 2, 1981, "Barnes-Tendy" conversation. The government's failure to produce this conversation for use at the trial of the instant case precluded the defendant from adequately cross-examining Barnes, who was the key government witness against the defendant, and from demonstrating the falsity of the "sermonette" delivered during re-direct examination.

Under the Jencks Act, a defendant in a federal criminal trial is entitled, after a government witness has testified on direct examination, to receive for purposes of cross-examination any "statement" of the witness in the government's possession "which relates to the subject matter as to which the witness has testified." 18 U.S.C. §3500(b). There can be no question but that the Barnes-Tendy conversation was indeed 3500 material which the government was obligated to produce timely. The conversation was a statement of the witness Barnes, and it related to mat-

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* Even if we assume that Barnes truly believed what he told the court—an assumption which is dubious at best—a new trial is required because the good faith of the witness is irrelevant to a *Napue* inquiry. *See United States* v. *Harris*, 498 F.2d 1164, 1169 (3d Cir.), *cert. denied*, 419 U.S. 1069 (1974) (government has an affirmative obligation to correct an untrue statement of a witness even if the witness made the statement in good faith). It is the deliberate use of false testimony that is dispositive, not the subjective intention of the witness.

ters he testified to, i.e., his decision to cooperate with the government.

On direct examination, Barnes was questioned about the commencement of his cooperation with the government. On cross-examination, defense counsel attempted to establish that Barnes' cooperation against Beverly Ash, Sperling's co-conspirator, was motivated by considerations of sexual jealousy. Apparently in response to that effort, on redirect the government sought to have Barnes expand upon his reasons for cooperation. What followed was an exercise in self-analysis in which Barnes attributed his change of heart to a realization of the shallowness of his former life. Clearly, Barnes' prior conversation with Chief Assistant Tendy, in which he stated he was motivated to cooperate by animus aganst his former friends, is related to his testimony within the meaning of the Jencks Act, and the government was required to produce it under that statute. *United States* v. *Pacelli*, 491 F.2d 1108, 1120 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

A statement may relate within the meaning of §3500(b) not only to the witness' factual narrative, but also to impeachment of his testimony by showing his bias, interest, or motive in testifying. *United States* v. *Birnbaum*, 337 F.2d 490, 497-98 (2d Cir. 1964). Here Barnes testified both as to the commencement of his cooperation and the reasons which precipitated that cooperation. Any prior statement on those topics was required to be disclosed to defense counsel.

The standard governing the grant of a new trial varies according to the extent of the government's culpability for its failure to disclose. If the failure of the government was deliberate or the result of gross negligence, a new trial is warranted if the evidence is merely material or favorable to the defense. *E.g. United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 986 (1973). Since the record below is devoid of any claim by the prosecutor with

custody of the tape as to why the tape was not disclosed to the defense, this Court must assume, as did the District Court and the Court of Appeals, that the tape was intentionally suppressed or knowingly ignored. In a case involving such deliberate action, petitioner would be entitled to a new trial, since prophylatic considerations designed to deter future prosecutorial misconduct are of over-riding importance in that circumstance. *Grant* v. *Alldredge*, 498 F.2d 376, 380 (2d Cir. 1974); *United States* v. *Pfingst*, 490 F.2d 262, 277 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968).

However, even if this Court is unwilling to accept the premise that the government's failure to disclose this Jencks Act material was intentional, petitioner is still entitled to a new trial. Under that circumstance, the test is whether "there was a significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). In applying that test to the facts of this case, one must inquire into both the significance of the withheld information and its bearing on the issues in the case in light of the other proof in the case. *United States* v. *Grammatikos*, 633 F.2d 1013, 1020 (2d Cir. 1980).

Contrary to the Second Circuit's finding that this tape merely provided cumulative impeachment material, it did not. Rather, the tape was direct evidence of motive and, as such, it could have been introduced in evidence to put the lie to Barnes' appearance as a reasonable man who has seen the errors of his former ways. Defense counsel had sought to inquire into Barnes' motives for testifying with respect to his sexual jealousy concerning co-conspirator Beverly Ash. A further exploration of Barnes motives against former friends may have been useful in establishing that Barnes had a specific animus against petitioner's

father which caused him to testify falsely against the son to get back at the father for some imagined wrong in the past. Indeed, Barnes testified that he knew petitioner's father, who had been previously convicted of narcotics offenses; they were even incarcerated in the same facility. This relationship and the revenge motive could have answered, for some jurors, the question of why Barnes picked Nicholas Sperling to testify against—he could thereby "get back" at the father, Herbert Sperling.

On the face of the record as it stood, there was no reason given why Barnes would have made up this story about Nicholas. Revenge against those he formerly dealt with, such as Herbert Sperling, may well have provided the missing rationale.

Moving from the significance of the taped conversation in the context of the use it could have been put to by defense counsel to an evaluation of the impact the conversation might have had on the case as a whole, one must view the quality and amount of the other evidence against petitioner. If Barnes-Tendy conversation had been available during the trial, it may well have affected the mind of one juror. Its non-disclosure was not, therefore, harmless beyond a reasonable doubt. *Cf.* Rule 52(a) of the Federal Rules of Criminal Procedure.

During the course of the trial, the District Court analyzed the evidence by stating that if the jury believed Barnes, Sperling would be convicted, and if the jury disbelieved Barnes, he would be acquitted. Barnes was, therefore, the crucial witness in the case. In the absence of Barnes' testimony, there would have been no unlawful answer in the record as to why Sperling met with Beverly Ash. This question was answered when Sperling testified on his own behalf and offered a plausible, legitimate explanation for all of his allegedly wrongful acts. The revelation of the vengeful motive in testifying against Sperling and Barnes' willingness to dissemble in front of the jury may well have

destroyed his credibility and entitled petitioner to a charge of *falsus in uno*.

It must be remembered that the government's case was entirely circumstantial. No one saw any heroin pass from petitioner to Ash, and the sale to Agent Baker was never consummated. Moreover, petitioner had no prior criminal record. In a case dependent on the credibility of one witness and in which the petitioner testified to a legitimate reason for his actions, it cannot be said with any certainty that the jury would not have been influenced by disclosure of an evil motive on the part of that critical witness.

3. *Failure to Disclose the Taped Conversation Violates the Standards Set Forth in Brady v. Maryland and United States v. Agurs.*

In failing to produce the Barnes-Tendy conversation, the government violated not only its obligation under the Jencks Act, but also the disclosure rule laid down by this Court in *Brady* v. *Maryland*, 373 U.S. 83 (1963). Under *Brady*, the prosecution has a duty to disclose all potentially exculpatory evidence to the defense. That rule was refined by this Court's decision in *United States* v. *Agurs*, 427 U.S. 97 (1976), which held the reversal of a conviction for failure to disclose exculpatory evidence depends upon whether or not defense counsel made a specific request for the evidence in question: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id.* at 106. In the case at bar, the district court found the defense had specifically requested tape recorded conversations between Barnes and the government. Under these circumstances, petitioner is entitled to a new trial if there is *any* reasonable likelihood the evidence *might* have affected the outcome of the trial. *Ostrer* v. *United States*, 577 F.2d 782 (2d Cir. 1978), *cert. denied*, 439 U.S. 115 (1979). Again, in the context of a case which, according to the district court, was totally dependent on one witness, the informa-

tion of evil motive against petitioner because of something his father may have done may well have created a reasonable doubt with the jury.

The government did have custody of the Barnes-Tendy tape conversation. Indeed, the prosecutor who questioned Barnes here had the tape from the time of Sperling's arrest and throughout the trial. That tape portrayed Barnes as motivated by animus against others when he described himself as motivated by conscience. Under these circumstances, the jury's judgment may have been affected by the evidence that the key prosecution witness was driven by revenge. Petitioner is, therefore, entitled to a new trial.

POINT II

A New Trial Should Be Ordered Pursuant to the Federal Judiciary's Supervisory Authority Over Federal Law Enforcement.

The government has sought to justify its failure to produce the conversation as a matter of inadvertence on the part of the supervising attorney. However, the tape and transcript had been placed into the custody of the prosecutor on this case after petitioner's arrest. Surely, since that prosecutor was given this tape in connection with the arrest of petitioner, the obligation to turn it over to the defense in this case could not have escaped his attention. Materials which are turned over to a prosecutor in connection with a particular defendant consisting of a tape and transcript of a conversation between the government witness and the Chief Assistant United States Attorney are too dramatic to escape the attention of the very prosecutor who is to question that government witness.* Such a tape is, "not like F.B.I. reports lying around in files

* The knowledge of one assistant is clearly attributable to his colleagues. *Giglio* v. *United States*, 405 U.S. 150, 92 S.Ct. 763 (1972).

which a prosecutor could well forget." *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).*

At the very least, an evidentiary hearing should be held to assess the extent of the government's culpability in this matter. The very prosecutor who elicited the self-serving declarations had actual possession of the recording of the first conversation between the government and Barnes in which Barnes expressed his true testimonial motivation—to get revenge against his former associates in the narcotics business. The prosecutor had presumably listened to the tape as part of his preparation for trial, and he, therefore, knew that Barnes had previously expressed a contrary motive for testifying. Sitting next to the prosecutor who was actually questioning Barnes was another and more senior prosecutor, the Chief of the Narcotics Section, who also knew of the tape recorded conversation and its contents. Yet she, too, sat silently by while Barnes portrayed himself as a man now moved to testify for the government for altruistic reasons instead of revenge.

When defense counsel ultimately received the Barnes tape recorded conversation after trial, a motion was promptly made for a new trial or a hearing into the circumstances surrounding the government's suppression of evidence which contradicted Barnes' in-court testimony. The government responded with an affidavit from the second prosecutor on the matter, who had neither prepared the 3500 material, nor questioned Barnes at trial, although she had had possession of the tape at one time and knowledge of its contents. There was no sworn response to the motion from the primary prosecutor who

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* This Court should know it was in the case of this defendant's father that this prosecutorial office also failed to produce important Jencks Act materials. At that time, the government also attempted to characterize its failure as inadvertent. The Second Circuit did not accept that explanation, and this Court should not do so here.

had had actual custody of the tape, had prepared the 3500 material to be turned over to defense counsel, and who questioned Barnes concerning his motivation.

When petitioner established that the record before the district court was insufficient because such a sworn statement was indeed lacking, the government moved to expand the record to include an affidavit from the prosecutor who tried the case. It should be of no avail to the government that it has moved, after proceedings have been completed in the district court, to remedy such an obvious error there, since matters of additional substance are not properly subject of motions pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure.

Not only did the government move to expand the record, but it also, without an order from the Court of Appeals, treated the record as if the motion had been granted. If the situation were reversed and a defendant sought to expand the trial record in this matter, this Court would clearly find that he had waived the issue in the district court, and the rubric should apply equally to the government. *See, e.g., United States* v. *Petito,* 671 F.2d 68 (2d Cir. 1982).

With no sworn statement in the district court, that court's holding, and the subsequent holding of the Second Circuit, were based on inadequate records. This matter should be remanded for a hearing into how and why this material, which no one questions defense counsel was entitled to, was suppressed. *See, e.g., United States* v. *Morell,* 524 F.2d 550 (2d Cir. 1975).

Lastly, appellant urges this Court to use this case as the opportunity to finally put a stop to the repeated incidents of forgetfulness which seem to plague certain federal prosecutorial offices. *See, e.g., United States* v. *Rosen,* 516 F.2d 269 (2d Cir. 1975); *United States* v. *Seijo,* 514 F.2d 135 (2d Cir. 1975); *United States* v. *Sperling,* 506 F.2d 1323 (2d Cir. 1974), *cert. denied,* 420 U.S. 962 (1975).

It is apparent that it is not sufficient merely to remind these prosecutors of their obligations. It is necessary for this Court to grant certiorari and reverse a conviction either for a violation of due process or as an exercise of its supervisory powers. This conviction should be the one. *See United States* v. *Hasting*, 461 U.S. ——, 103 S.Ct. 1974, 1990 (1983) (Brennan, J., concurring in part, dissenting in part).

CONCLUSION

For the reasons set forth, we respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

NEWMAN & ADLER
Attorneys for Petitioner

ROGER BENNET ADLER, P.C.
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Of Counsel

Certificate of Service

This is to certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, on the 7th day of May, 1984, to the Solicitor General, Washington, D.C.

ROGER BENNET ADLER

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 213—August Term, 1983

(Argued October 20, 1983 Decided January 20, 1984)

Docket No. 83-1164

UNITED STATES OF AMERICA,

Appellee,

—v.—

NICHOLAS SPERLING,

Defendant-Appellant.

Before:

FRIENDLY, VAN GRAAFEILAND and MESKILL,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Knapp, *J.*, convicting appellant of distribution of and possession with intent to distribute heroin, 21 U.S.C. § 841(a)(1) (1982), and of conspiracy to commit the substantive offense, 21 U.S.C. § 846 (1982). We hold that the tape that was not produced by the government until after the trial contained only cumulative impeaching evidence, and, even if deliberately withheld, it did not require a retrial or an evidentiary hearing; the admission of evidence that the

defendant performed acts described in the hearsay declarations of others was proper; a government witness could competently testify to a 1980 agreement to engage in drug transactions even though that agreement was not part of the charged conspiracy; the cross-examination of the defendant regarding his lifestyle, spending habits, false credit card applications and post-arrest statements was proper; the exclusion of evidence of a deceased co-conspirator's other drug dealings was proper; and the evidence was sufficient to support a guilty verdict on the distribution count.

Affirmed.

ROGER BENNET ADLER, New York, New York (Robert Blossner, Deborah A. Schwartz, New York, New York, of counsel), *for Defendant-Appellant.*

RHEA NEUGARTEN, Assistant United States Attorney, Southern District of New York, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Benito Romano, John M. McEnany, Peter Romatowski, Assistant United States Attorneys, Southern District of New York, New York, New York, of counsel), *for Appellee.*

MESKILL, *Circuit Judge:*

Nicholas Sperling appeals his conviction for distribution of and possession with intent to distribute heroin under 21 U.S.C. § 841(a)(1) (1982) and for conspiracy to commit the substantive offense under 21 U.S.C. § 846 (1982). We affirm.

Opinion of the United States Court of Appeals for the Second Circuit

I

In 1977, Leroy "Nicky" Barnes was convicted of various narcotics offenses and of conducting a continuing criminal enterprise. After an unsuccessful appeal and petition for certiorari, Barnes began serving a life sentence without the possibility of parole. In 1982, he began providing information to the government in exchange for a promise that the Pardon Bureau in Washington, D.C. and anyone else he wanted would learn of his cooperation, and in the hope that his actions would eventually earn him a Presidential pardon.

Barnes was the government's most important witness in the trial that is the subject of this appeal. In January 1982, he was transferred to the Metropolitan Correctional Center (MCC) in New York City. Appellant Sperling's father, Herbert Sperling, was serving a life sentence for various narcotics offenses and was transferred to the MCC at about the same time. Barnes testified that he and Herbert Sperling agreed that Beverly Ash, a former girlfriend of Barnes, would meet with Nicholas Sperling to carry out a narcotics transaction at the Stage Delicatessen in midtown Manhattan. According to Barnes, Ash and Nicholas Sperling were to carry *Life* magazines as a recognition signal. Immediately after this discussion with Herbert Sperling, Barnes called the Drug Enforcement Administration (DEA) and reported on the proposed heroin deal.

The jury heard testimony about the following events. On February 11, 1982, DEA Agent Stanley Morrissey observed Ash at the Stage Delicatessen carrying a *Life* magazine. Nicholas Sperling entered the delicatessen with a folded magazine, left after a few minutes, returned without the magazine and seated himself across from Ash. Sperling placed a white piece of paper in front of Ash and left a few minutes later.

About a week after that meeting, DEA Agent Robert Baker, posing as a heroin buyer, was introduced to Ash. Ash discussed a possible sale with Baker and gave him a list of heroin prices. Two weeks later, she gave him another price list and a sample of heroin. According to Barnes, Herbert Sperling told him later that Nicholas Sperling had passed a sample of heroin to Ash.

Early on April 15, 1982, Ash called Baker to tell him she was going to meet her "source" at noon that day. From 11:35 a.m. when Ash left her apartment until 2:00 p.m. when she returned, she remained alone except for a 12:15 p.m. meeting with Nicholas Sperling at the Stage Delicatessen. No heroin was passed during that meeting and Sperling left within ten minutes of seeing Ash. At about 2:00 p.m., pursuant to their earlier arrangement, Baker called Ash and learned that Ash's "source" had agreed to sell Baker four ounces of heroin. Ash discussed the proposed sale with Baker several tmes before and after the April 15 meeting and referred to her source as a "young guy" and as "Nick" or "Nicky." The proposed sale never materialized, however. Ash was indicted along with Sperling but was murdered before trial.

After Sperling's trial and conviction, the government turned over to the defense a transcript of a pretrial conversation between Barnes and Chief Assistant United States Attorney William Tendy in which Barnes indicated that his primary motive for being an informant was to get back at his "former friends." [1] Sperling then moved before

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[1] The pertinent portions of this conversation are as follows:

TENDY: O.K. Now, go ahead. Tell me what it is you have in mind.

BARNES: Well . . . er . . . [sighs] you mean specifically, right?

TENDY: Well, no, just generally—the reason why you want to get in touch with me.

(footnote continued on next page)

Judge Knapp for a new trial under Fed. R. Crim. P. 33. The government conceded that it should have produced the tape, but claimed that the tape was not deliberately suppressed and was cumulative in any event. Judge Knapp denied the motion. Sperling appeals from the judgment of conviction and from the denial of his post-trial motion.

II

Sperling contends that he is entitled to a new trial because of the government's failure to disclose significant Jencks Act material in a "closely contested case." In the alternative, he asks for a hearing to determine whether the government's failure to produce the tape until after trial was deliberate or merely negligent. Sperling also argues that state of mind declarations of others were improperly admitted to show his state of mind and that

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(footnote continued from previous page)

BARNES: Well, in general, there, there, there are a, a few friends of mine, former friends of mine, that . . . er . . . that were just . . . .

TENDY: I can't hear you very well.

BARNES: Er . . . there were a couple of friends of mine that were suppo d to be doing things for me, you know . . . .

TENDY: Yeah?

BARNES: And er, and er, well, they're doing things against me really. . . .

TENDY: Um hum.

BARNES: And, and, and I have no way to reach out to get to 'em and I want to get back at 'em, really.

TENDY: Um hum.

BARNES: That's my primary reason.

TENDY: Yeah?

BARNES: And, er . . . I . . . I wanted to know what I could possibly do, you know, what, er, you know, what it is that you might want.

App. at 218-19 (transcript dated July 2, 1982).

testimony of drug transactions occurring prior to the alleged conspiracy was improperly admitted as background to the conspiracy. He further claims that he was unfairly prejudiced by being cross-examined about his lifestyle, spending habits, false credit card applications and post-arrest statements. Additionally, he complains about the court's exclusion of evidence of his co-conspirator's other drug dealings. Finally, he maintains that there was insufficient evidence to support the jury's guilty verdict on the distribution count.

We conclude that even if the government withheld the tape deliberately, which it denies, there is no reasonable likelihood that the timely production of the tape would have affected the verdict. We find no merit in Sperling's other claims.

The seminal case on the issue of government withheld evidence is *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), in which the Supreme Court stated that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." This standard was clarified in *United States* v. *Agurs*, 427 U.S. 97 (1976), in which the Supreme Court set forth three distinct categories of cases to which *Brady* applies: (1) where the undisclosed evidence shows that the government's case included perjured testimony about which the government knew or should have known; (2) where the defendant made a specific request for *particular* undisclosed information; or (3) where the defendant made only a general request or no request at all. If the evidence falls into either of the first two categories, a new trial must be granted if there is any reasonable likelihood that the undisclosed evidence could have changed the verdict. If the evidence is within the third category, a new trial is required only if

the undisclosed evidence creates a reasonable doubt where there was none before. *See Ostrer* v. *United States*, 577 F.2d 782, 786 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

Judge Knapp assumed that Sperling did make a specific request for tapes and that the failure to produce the Barnes-Tendy tape fell into the second category, calling for application of the stricter standard. He nonetheless held that the tape was only a cumulative statement of what was already before the jury, and that there was no reasonable ground for believing the verdict might have been different if Sperling had obtained the tape before trial. We agree.

Barnes gave ample testimony tending to show that revenge was his motive for cooperating with the government. First, Barnes testified on cross-examination that he gave information against his attorneys "because they double-crossed me like everybody else did." App. at 100. Second, Barnes also testified on cross-examination that he gave information leading to the arrest of his former girlfriends, Thelma Grant and Beverly Ash, partly because they had sexual relations with some of his friends who were fellow members of his council of prominent heroin dealers. App. at 115-17. Third, on redirect examination, Barnes again indicated his displeasure with "the Detroit lawyers [who] had swindled me out of big pieces of money," and with Grant and Ash, who Barnes said did "the only thing I asked them not to do." App. at 120-21.

Sperling, however, focuses on a later portion of the redirect examination. He claims that Barnes' more introspective stated reasons for cooperation, such as the fact that he once defined his life in terms of narcotics and now found his life meaningless, were the *only* reasons he gave at trial for cooperating. Thus, Sperling concludes, the Barnes-Tendy tape gave reasons for cooperation that were

different from those elicited at trial. This claim is contradicted by the testimony. Moreover, the government's question that led to Barnes' introspective monologue was whether there were any reasons Barnes might have had for cooperating *other than* his relations with Grant and Ash. Also, the redirect testimony that tended to show a revenge motive, dealing with Barnes' Detroit lawyers and the relations between his fellow council members and his girlfriends, immediately preceded Barnes' more introspective musings. In sum, the tape indicating that Barnes' reason for cooperating with the government was to get back at unnamed former friends adds nothing of importance to Sperling's case.

There was ample record testimony that would have tended to impeach Barnes' testimony. The defense sought to destroy Barnes' credibility on cross-examination by eliciting a litany of Barnes' past misdeeds. The government began its direct examination by asking Barnes about his prior convictions and discussed his heroin dealings at great length. Even Judge Knapp pointed out during voir dire that Barnes was a person of questionable reputation, and Barnes himself testified about his revenge motive for cooperation. A few words on a tape indicating that Barnes had turned informant to get back at former friends, in light of this mountain of impeaching evidence, could not have made a difference at trial.

Finally, we find no merit in Sperling's contention that failure to produce the tape should result in a retrial or a hearing because the case was close. The *Agurs* standard used by Judge Knapp gave any possible benefit of the doubt to Sperling. Thus, we hold that nothing on the tape could have been used by skilled counsel to induce "a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969). Even if the government's misconduct was

wanton and deliberate (which we do not suggest here), the lack of this evidence could not reasonably have affected the verdict.

Sperling's counsel nonetheless suggested at oral argument that this Court should go beyond the *Agurs* standards and exercise its supervisory power to determine whether the government actually engaged in misconduct. He seeks punishment for misconduct or even for repeated negligence if either is found. We do not condone repeated acts of negligence or deliberate suppression of evidence by the government, but we do not believe that it is appropriate on this record to reverse or to remand for further proceedings. *See Brady*, 373 U.S. at 87; *Agurs*, 427 U.S. at 110; *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). In a proper case the government's conduct may provide its own punishment, such as when it fails to produce potentially material evidence which might have led to a different result. *Cf. United States* v. *Miller*, 411 F.2d 825 (2d Cir. 1969) (new trial granted for prosecution's failure to disclose that defendant was questioned by prosecutor while under pretrial hypnosis). In this case, however, the issue of culpability has no bearing on the fairness of Sperling's trial.[2]

III

Sperling next argues that his participation in a conspiracy was not proved by a fair preponderance of the

[2] *United States* v. *Torres*, 719 F.2d 549 (2d Cir. 1983), relied on by appellant at oral argument, is inapposite. In *Torres*, the belatedly produced evidence, an FBI report, was ambiguous and subject to several possible explanations, depending on facts that had not been produced at trial. Remand was therefore appropriate to determine how to interpret the report. Here, however, there is no ambiguity in the tape and Judge Knapp could correctly conclude that it was cumulative impeaching evidence.

evidence independent of hearsay utterances. *See United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). He contends that conversations between his father and Barnes, and between Baker and Beverly Ash, are inadmissible to show his state of mind. Sperling contends that the *Hillmon* doctrine which creates an exception to the hearsay rule for testimony as to a declarant's state of mind, Fed. R. Evid. 803(3); *see Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285 (1892), cannot be extended to admit testimony to show the state of mind of a *non*declarant. Specifically, Sperling argues that Beverly Ash's statements to Agent Baker regarding her April 15 meeting with Sperling at the Stage Delicatessen, and Barnes' testimony that Herbert Sperling said he would send his son to the Stage Delicatessen for a heroin transaction, are hearsay statements not admissible under *Hillmon*.

However, the government is not attempting to use *Hillmon* to show the state of mind of a nondeclarant. It instead relies on *United States* v. *Cicale*, 691 F.2d 95 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3756 (U.S. Apr. 18, 1983), for the position that a declarant's *Hillmon* declarations regarding his own state of mind are admissible against a nondeclarant when they are linked with independent evidence that corroborates the declarations.

We need not join the debate regarding whether or not Hillmon declarations are admissible to prove the state of mind of a third party. *See, e.g., Cicale*, 691 F.2d at 109 (Ward, *J.*, dissenting). We follow the law of this Circuit as set forth in *Cicale*. In that case, one Messina repeatedly told a DEA agent that he was going to meet with his "source." Soon after each declaration, Messina was seen with Cicale or arriving at Cicale's residence. We held that where Cicale's participation in meetings with Messina was proven by competent nonhearsay evidence independent of

the *Hillmon* declarations, Messina's *Hillmon* declarations were admissible to show that the meetings were the drug transactions of which he spoke. In other words, Messina's declarations could be admitted to show his state of mind, *i.e.*, his intent to meet with an unknown heroin source. When independent evidence showed that Messina met with Cicale and that the meeting could be linked to Messina's declarations, Cicale's participation in the heroin deal with Messina was proved.

The instant case is controlled by *Cicale*. Ash told DEA Agent Baker of her intent to engage in an illicit transaction at noon. She met with no one between 11:30 a.m. and 2:00 p.m. except Nicholas Sperling. This eyewitness testimony of the DEA agents who watched Ash links Sperling to the proposed drug transaction that Ash described to Baker in her *Hillmon* declaration. So also does Nicholas Sperling's own testimony about the actions described in the Barnes-Herbert Sperling conversation, *i.e.*, meeting Ash at the Stage Delicatessen with a magazine in hand.

IV

Sperling also contends that the trial court erred in denying a motion to strike Barnes' testimony regarding 1980 conversations between Barnes and Herbert Sperling at the Federal Penitentiary in Marion, Illinois. The trial court ruled that the conversations were inadmissible as part of the 1982 conspiracy, but that they could be admitted as background to that conspiracy to show a prior successful course of dealing. The court also held, however, that two short references to Nicholas Sperling in the 1980 conversations were inadmissible under any circumstances, but denied Sperling's motion for a mistrial on the ground that the jury had probably forgotten those

references and that any error caused by admitting them was harmless.

Sperling seems to contend only that the admission of the Barnes-Herbert Sperling conversations as background was reversible error. We reject this contention. In *United States* v. *Moten*, 564 F.2d 620, 628 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977), we held that "proof of prior drug dealing by individual defendants with [a government informant] . . . was clearly admissible to show the basis for the existence of the conspiracy charged and the mutual trust which existed between [the informant] and his customers." Even if Sperling's claim is that the two brief references to him early in the lengthy Barnes testimony prejudiced him with the jury, we agree that the admission of those two passages, at most, was harmless error.

We also reject Sperling's claim that the government improperly cross-examined him regarding his lifestyle, spending habits, false credit card applications and post-arrest statements. The government was entitled to use otherwise unexplained or unexplainable sources of income to prove illegal dealings and to cross-examine Sperling regarding his lavish expenditures. *E.g.*, *United States* v. *Barnes*, 604 F.2d 121, 147 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). It was also proper for the government to cross-examine Sperling regarding his false credit card applications to show a general lack of credibility. This is acceptable cross-examination under Fed. R. Evid. 608(b)(1). Sperling's post-arrest statements were admissible in the absence of an allegation that his *Miranda* rights were violated. *See Miranda* v. *Arizona*, 384 U.S. 436 (1966). *Doyle* v. *Ohio*, 426 U.S. 610 (1976), relied on by appellant, is inapposite here, as that case relates only to post-arrest *silence*. Furthermore, there is not even a hint that the evidence was more prejudicial than probative. The district court did not abuse its broad discretion on this eviden-

tiary ruling. *E.g., United States* v. *Aulet*, 618 F.2d 182, 191 (2d Cir. 1980).

Appellant's last two claims are also meritless. Evidence of Ash's subsequent heroin dealings with DEA Agent Baker was irrelevant and thus properly excluded, and there was ample evidence to support a guilty verdict on Count II (distribution).

Affirmed.

APPENDIX B

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of March one thousand nine hundred and eighty-four.

No. 83-1164

UNITED STATES OF AMERICA,

Appellee,

v.

NICHOLAS SPERLING,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Nicholas Sperling,

Upon consideration by the panel that heard the appeal, it is,

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

/s/ FRANCIS X. GINDHART
by Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX C

Constitutional Provisions Involved

U.S. CONSTITUTION, AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Statutory Provisions Involved

RULE 10. THE RECORD ON APPEAL

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(e) *Correction or Modification of the Record.* If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

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RULE 33. NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

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Statutory Provisions Involved

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

* * * * *

§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant

to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.